

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

RYAN SHAPIRO
12 James Way
Cambridge, MA 02141,

and

JEFFREY STEIN
4547 Grant Road, NW
Washington, DC 20016,

and

NATIONAL SECURITY COUNSELORS
1200 South Courthouse Road, Suite 124
Arlington, VA 22204,

and

TRUTHOUT
3539 Bradshaw Road #B-166
Sacramento, CA 95827,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530,

Defendant.

Civil Action No. 1:12-cv-01883

* * * * *

COMPLAINT

Plaintiffs Ryan Shapiro, Jeffrey Stein, National Security Counselors, and Truthout bring this action against Defendant Department of Justice pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, as amended (“FOIA”), the Privacy Act, 5 U.S.C. § 552a, *et seq.*

(collectively “FOIA/PA”), the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. § 1651.

JURISDICTION

1. This Court has both subject matter jurisdiction over this action and personal jurisdiction over Defendant pursuant to 5 U.S.C. § 552(a)(4)(B), 552a(g)(1)(D) and 28 U.S.C. § 1331.

VENUE

2. Venue is appropriate under 5 U.S.C. §§ 552(a)(4)(B), 552a(g)(5) and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Ryan Shapiro (“Shapiro”) is a U.S. citizen and is a resident of the Commonwealth of Massachusetts.

4. Plaintiff Jeffrey Stein (“Stein”) is a U.S. citizen and is a resident of the District of Columbia. Stein is a representative of the news media within the meaning of 5 U.S.C. § 552(a)(4)(A).

5. Plaintiff National Security Counselors (“NSC”) is a non-profit organization under the laws of the Commonwealth of Virginia and has the ability to disseminate information on a wide scale.

6. Plaintiff Truthout is a non-profit organization under the laws of the state of California. Truthout is a representative of the news media within the meaning of 5 U.S.C. § 552(a)(4)(A).

7. Defendant Department of Justice (“DOJ”) is an agency within the meaning of 5 U.S.C. § 552(e), and is in possession and/or control of the records requested by Plaintiffs which are the subject of this action.

8. The Civil Division (“Civil”), Executive Office for United States Attorneys (“EOUSA”), Federal Bureau of Investigation (“FBI”), Justice Management Division (“JMD”), and Office of Information Policy (“OIP”) are DOJ components.

PART I: PROCESSING MATERIALS

FIRST CAUSE OF ACTION

(SHAPIRO – FBI/OIP – CONSTRUCTIVE RECORDS DENIAL – 61 REQUESTS)

9. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

Fifty-nine FBI Requests

10. On 10 February 2012 Shapiro submitted to FBI a FOIA/PA request for the administrative processing files for seventy-one specified FOIA requests filed by him, specifying that search slips and Case Evaluation Forms were to be considered responsive. Fourteen of these specified FOIA requests are currently the subject of the related case *Shapiro v. DOJ*, No. 12-313 (BAH).

11. Between 15 February 2012 and 29 February 2012 FBI acknowledged receipt of this request and assigned it fifty-nine individual request numbers.

12. As of this writing FBI has not issued a final determination for any of these requests.

Two OIP Requests

13. On 8 March 2012 Shapiro submitted to OIP a FOIA/PA request for the administrative processing files for forty specified FOIA appeals filed by him.

14. On 17 April 2012 OIP acknowledged receipt of this request and assigned it Request No. 12-00562.

15. As of this writing OIP has not issued a final determination for this request.

16. On 16 November 2011 Shapiro submitted to OIP a FOIA/PA request for records pertaining to the determination that he was entitled to a public interest fee waiver for his FOIA requests.

17. On 20 December 2011 OIP acknowledged receipt of this request and assigned it Request No. 12-00217.

18. As of this writing OIP has not issued a final determination for this request.

19. As twenty working days have elapsed without substantive determinations by FBI or OIP, Shapiro has exhausted all required administrative remedies.

20. Shapiro has a legal right under FOIA/PA to obtain the information he seeks, and there is no legal basis for the denial by DOJ of said right.

SECOND CAUSE OF ACTION

(STEIN – FBI – RECORDS DENIAL – 1174507-000, 1182250-000, 1182251-000)

21. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

Request No. 1174507-000

22. On 28 September 2011 Stein submitted to FBI a FOIA request for all information pertaining to the searches conducted by FBI which was used, referenced, or relied upon in the Declarations of David Hardy to defend the adequacy of the FBI's searches in six specified cases.

23. On 4 October 2011 FBI acknowledged receipt of this request and assigned it Request No. 1174507-000. FBI refused to process the request without privacy waivers.

24. On 6 October 2011 Stein appealed this determination to OIP. OIP acknowledged this appeal on 24 May 2012 and assigned it Appeal No. AP-2012-02371.

25. On 25 September 2012 OIP affirmed FBI's determination "on modified grounds." OIP invoked Exemption (b)(7)(E) even though FBI had never asserted it.

Request Nos. 1182250-000 and 1182251-000

26. On 10 November 2011 Stein submitted to FBI a FOIA request for all information pertaining to the searches conducted by FBI which was used, referenced, or relied upon in the Declarations of David Hardy to defend the adequacy of the FBI's searches in two specified cases.

27. On 15 February 2012 FBI acknowledged receipt of this request, divided it in two, and assigned them Request Nos. 1182250-000 and 1182251-000.

28. On 31 May 2012 FBI released multiple records responsive to Request No. 1182250-000 and withheld several others.

29. On 4 June 2012 Stein appealed this determination to OIP. OIP acknowledged this appeal on 11 June 2012 and assigned it Appeal No. AP-2012-02511.

30. On 27 September 2012 OIP affirmed FBI's withholdings.

31. As of this writing FBI has not issued a final determination for Request No. 1182251-000.

32. As twenty working days have elapsed without a substantive determination by FBI, Stein has exhausted all required administrative remedies.

33. Stein has a legal right under FOIA to obtain the information he seeks, and there is no legal basis for the denial by DOJ of said right.

THIRD CAUSE OF ACTION

(NSC – FBI – RECORDS DENIAL – 1152912-002, 1152931-002, 1152932-002, 1152933-002, 1152934-002, 1152935-002, 1174832-000)

34. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

Request Nos. 1152912-002, 1152931-002, 1152932-002, 1152933-002, 1152934-002, and 1152935-002

35. On 26 October 2010 NSC submitted to FBI a FOIA request for the administrative processing files for seven specified FOIA requests.

36. On 6 December 2010 FBI acknowledged receipt of this request and assigned it Request No. 1156218-000. FBI released eight redacted pages from the “Notes” section of the FBI FOIPA Document Processing System (“FDPS”). FBI did not withhold any records in their entirety.

37. On 13 January 2011 NSC appealed the adequacy of FBI’s search to OIP. OIP acknowledged this appeal on 31 January 2011 and assigned it Appeal No. AP-2011-00881.

38. On 24 June 2011 OIP remanded this request to the FBI for further searches.

39. On 21 September 2011 FBI released the same records to NSC regarding six¹ of the original FOIA requests, dividing Request No. 1156218-000 into Request Nos. 1152912-002, 1152931-002, 1152932-002, 1152933-002, 1152934-002, and 1152935-002. FBI did not withhold any records in their entirety.

40. On 4 November 2011 NSC again appealed the adequacy of FBI's searches to OIP. In this appeal NSC specifically made note of the fact that no search slips were processed. OIP acknowledged these appeals on 16 November 2011 and assigned them Appeal Nos. AP-2012-00449, AP-2012-00450, AP-2012-00451, AP-2012-00452, AP-2012-00453, and AP-2012-00454.

41. On 20 January 2012 OIP remanded this request to the FBI for further searches. OIP further stated, "Because [search slips] would be categorically exempt from disclosure, the FBI properly asserted Exemption 7(E) and was not required to conduct a search for such records," despite the fact that FBI had never asserted Exemption (b)(7)(E) or even acknowledged that there were records it did not search for.

Request No. 1174832-000

42. On 5 October 2011 NSC submitted to FBI a FOIA request for the administrative processing files for twelve specified FOIA requests.

43. On 6 October 2011 FBI acknowledged receipt of this request and assigned it Request No. 1174832-000.

44. On 31 October 2011 FBI released six redacted pages to NSC pertaining to one of the original requests and declared all records about the remaining eleven requests to be blanketly

¹ The seventh request is not the subject of this complaint.

exempt without privacy waivers. There is no indication FBI conducted a search for responsive records pertaining to the remaining eleven requests.

45. On 9 November 2011 NSC appealed FBI's refusal to search for responsive records to OIP. OIP acknowledged this appeal on 22 November 2011 and assigned it Appeal No. AP-2011-00551.

46. On 15 February 2012 OIP affirmed FBI's determination "on partly modified grounds." OIP again invoked Exemption (b)(7)(E) even though FBI had never asserted it.

47. NSC has a legal right under FOIA to obtain the information it seeks, and there is no legal basis for the denial by DOJ of said right.

FOURTH CAUSE OF ACTION

(TRUTHOUT – FBI – RECORDS DENIAL – 1196979-000)

48. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

49. On 24 January 2012 Truthout submitted to FBI a FOIA request for the administrative processing file for FOIA Request No. 1164662-000.

50. On 17 August 2012 FBI acknowledged receipt of this request and assigned it Request No. 1196979-000 and stated that all responsive records are blanketly exempt. FBI made no mention of whether it performed a search or placed a litigation hold on all responsive records.

51. On 12 September 2012 Truthout appealed this determination to OIP. OIP acknowledged this appeal on 27 September 2012 and assigned it Appeal No. AP-2011-00551.

52. As of this writing OIP has not issued a final determination on this appeal.

53. As twenty working days have elapsed without a substantive determination by OIP, Truthout has exhausted all required administrative remedies.

54. Truthout has a legal right under FOIA to obtain the information it seeks, and there is no legal basis for the denial by DOJ of said right.

FIFTH CAUSE OF ACTION

(ALL – FOIA – BLANKET INVOCATIONS OF EXEMPTION (B)(7)(E))

55. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

56. On 16 March 2012 an OIP representative informed NSC Executive Director Kel McClanahan (“McClanahan”) that FBI had adopted a policy of refusing to process search slips less than twenty-five years old for release based on Exemption (b)(7)(E) and that OIP endorsed it.

57. Records documenting an FBI search for records responsive to a FOIA request are not properly covered by Exemption (b)(7)(E). This holds doubly true for FOIA requests which become the subject of litigation.

58. A policy of blanketly refusing to process search slips younger than a certain age based on Exemption (b)(7)(E) is a violation of FOIA. Such a policy constitutes outrageous conduct for purposes of the broad equitable powers provided by FOIA to the Court. Such a policy is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

59. As frequent FOIA requesters to FBI for administrative processing materials who have made many such requests in the past and will continue making such requests, Plaintiffs stand to continue to be harmed by this ongoing practice in the future.

60. Plaintiffs are therefore entitled to relief in the form of a declaratory order that FBI is in violation of its statutory responsibilities under FOIA and an order enjoining FBI pursuant to that statute from invoking Exemption (b)(7)(E) to withhold information about FOIA searches.

SIXTH CAUSE OF ACTION

(ALL – FOIA – REFUSALS TO CONDUCT SEARCHES)

61. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

62. FOIA requesters have no privacy interest in the processing of their FOIA requests. This holds doubly true for FOIA requests which become the subject of litigation.

63. A policy of blanketly refusing to conduct searches for records pertaining to previous FOIA requests without privacy waivers is a violation of FOIA. Such a policy constitutes outrageous conduct for purposes of the broad equitable powers provided by FOIA to the Court. Such a policy is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

64. As frequent FOIA requesters to FBI for administrative processing materials who have made many such requests in the past and will continue making such requests, Plaintiffs stand to continue to be harmed by this ongoing practice in the future.

65. Plaintiffs are therefore entitled to relief in the form of a declaratory order that FBI is in violation of its statutory responsibilities under FOIA and an injunction compelling FBI pursuant to that statute to conduct searches for records pertaining to previous FOIA requests without requiring privacy waivers.

SEVENTH CAUSE OF ACTION

(STEIN – FBI – RECORDS DENIAL – 1180930-000)

66. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

67. On 13 September 2011 Stein submitted to FBI a FOIA request for all the FBI Work Processing Unit (“WPU”) Case Evaluation Forms completed since October 2008. Upon information and belief, these forms are completed during random quality control audits of FOIA requests.

68. On 15 September 2011 FBI acknowledged receipt of this request and assigned it Request No. 1173249-000.

69. On 19 December 2011 FBI informed Stein that it would have to manually search every FOIA request file to locate the Case Evaluation Forms and that it would close the request unless Stein agreed to limit the scope of the request.

70. On 28 December 2011 Stein requested more information regarding FBI’s use of the Case Evaluation Forms to aid him in limiting the scope of the request.

71. On 18 January 2012 FBI informed Stein that it had been previously mistaken and that Case Evaluation Forms are normally maintained in employees’ personnel folders and not the FOIA processing system.

72. On 20 January 2012 Stein sent FBI the following email:

You may limit your search for records to all Case Evaluation Forms located in the WPU employees’ personnel folders, regardless of their creation date. You do not have to search FDPS for responsive records. You may redact employees’ names and other personally identifiable information, allowing you to release the remainder of the Case Evaluation Forms without violating the employees’ privacy interests. If you wish to withhold any records, you must first identify them and then invoke your exemptions with particularity after first releasing any reasonably segregable information.

Pursuant to *Chambers* (cited in full in the request letter), now that this request has been made, you may not destroy any WPU Case Evaluation Forms currently in existence until the completion of this FOIA request. Please act immediately to place a litigation hold on all WPU Case Evaluation Forms in existence to prevent their destruction.

73. On 1 February 2012 FBI assigned this request Request No. 1180930-000 and stated that all responsive records are blanketly exempt. FBI made no mention of whether it performed a search or placed a litigation hold on all Case Evaluation Forms.

74. On 1 April 2012 Stein appealed this determination to OIP. OIP acknowledged this appeal on 17 April 2012 and assigned it Appeal No. AP-2012-01925.

75. As of this writing OIP has not issued a final determination on this appeal.

76. As twenty working days have elapsed without a substantive determination by OIP, Stein has exhausted all required administrative remedies.

77. Stein has a legal right under FOIA to obtain the information he seeks, and there is no legal basis for the denial by DOJ of said right.

EIGHTH CAUSE OF ACTION

(STEIN – FBI – RECORDS DENIAL – 1173248-000, 1173248-001)

78. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

79. On 13 September 2011 Stein submitted to FBI a FOIA request for all manuals, training materials, and similar reference materials regarding the Automated Case Support (“ACS”) and FDPS programs.

80. On 14 September 2011 FBI acknowledged receipt of this request and assigned it Request No. 1173248-000.

81. On 19 March 2012 FBI released some records and withheld other information.

82. On 2 April 2012 Stein appealed some withholdings to OIP. OIP acknowledged this appeal on 17 April 2012 and assigned it Appeal No. AP-2012-01924.

83. On 11 September 2012 OIP remanded this request to FBI for further processing.

84. On 1 October 2012 FBI acknowledged OIP's remand and assigned it Request No. 1173248-001.

85. On 19 October 2012 FBI released some records and withheld other information.

86. On 19 November 2012 Stein re-appealed many of the same withholdings to OIP. However, since all of the withholdings challenged in this appeal were previously raised in April 2012 in Appeal No. AP-2012-01924, Stein has exhausted all required administrative remedies.

87. Stein has a legal right under FOIA to obtain the information he seeks, and there is no legal basis for the denial by DOJ of said right.

PART II: FEE ISSUES

NINTH CAUSE OF ACTION

(NSC – FBI – FEE WAIVER DENIAL – 1148707-002)

88. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

89. In 2010 the FBI FOIA Electronic Reading Room read, in pertinent part, “Manual of Administrative Operations and Procedures (MAOP) -- 1,886 pages (Electronic copy of the record can be sent in CDROM form after a quick submission of electronic form or a FOIA request by mail.)”

90. On 19 May 2010 NSC submitted to FBI a FOIA request for an electronic copy of the MAOP using the electronic form. NSC requested a public interest fee waiver.

91. On 27 May 2010 FBI acknowledged receipt of this request and assigned it Request No. 1148707-000. FBI denied NSC's request for a public interest fee waiver and informed NSC that it would be sent a CD containing the MAOP upon payment of a \$15 fee.

92. On 3 June 2010 McClanahan called FBI FOIA Public Liaison Dennis Argall ("Argall") to complain about the denial of NSC's request for a public interest fee waiver, arguing that the MAOP should already be made publicly available pursuant to 5 U.S.C. § 552(a)(2). Argall granted NSC's request for a fee waiver and indicated that a CD would be forthcoming.

93. On 11 June 2010 FBI released an electronic copy of the MAOP to NSC on a single CD. The electronic copy was a poorly scanned version of the 1998 edition.

94. On 16 June 2010 NSC emailed David Sobonya ("Sobonya"), the FBI Public Information Officer, asking if the version released was the most current edition and/or the best quality version, emphasizing that NSC sought a copy of the current edition.

95. On 17 June 2010 Sobonya was advised by another FBI source that the January 2007 edition of the MAOP had been previously processed under FOIA for Request No. 1049564-000 but was not available in the Electronic Reading Room.

96. On 17 June 2010 FBI released an electronic copy of the January 2007 edition of the MAOP to NSC on a single CD. The electronic copy did not have a Table of Contents.

97. On 22 June 2010 NSC emailed Sobonya, asking if the January 2007 edition was the most current edition, and asking for a Table of Contents.

98. On 23 June 2010 Sobonya was advised by another FBI source that: a) no Table of Contents was processed for Request No. 1049564-000; b) NSC would have to submit a new

FOIA request for the Table of Contents; c) the most current edition was March 2008; and d) NSC would have to submit a new FOIA request for the March 2008 edition.

99. On 23 June 2010 Sobonya emailed NSC, informing it that he “believe[d] some revisions were made in 2008” and that NSC would have to submit a new FOIA request for either the Table of Contents or the most current edition.

100. On 23 June 2010 NSC emailed Sobonya, emphasizing that the original request had been for the full, current version of the MAOP and insisting that FBI stop sending only previously processed versions. After receiving no response from FBI, NSC re-sent the 23 June 2010 email on 23 July 2010, with a copy to Argall.

101. On 26 July 2010 Argall emailed NSC, stating that FBI would reprocess the request for the entire MAOP or just the Table of Contents, depending on NSC’s wishes. NSC replied that it wanted whatever records were necessary to allow it to construct a current edition.

102. On 8 February 2011 FBI assigned this request Request No. 1148707-001 and released a paper copy of the Table of Contents of the current MAOP to NSC, stating, “This completes the processing of your FOIA request by the FBI.”

103. On 11 February 2011 NSC emailed Argall, reemphasizing that the request was for the a) full b) current c) MAOP. On 15 February 2011 NSC added that the request was specifically for an electronic record and asked Argall to send an electronic file of the Table of Contents immediately and an electronic file of the remainder of the document when it was ready for release.

104. On 18 February 2011 FBI assigned this request Request No. 1148707-002 and stated that it had denied NSC’s request for a public interest fee waiver.

105. On 24 February 2011 NSC emailed Argall, pointing out that he had approved NSC's request for a fee waiver in June 2010.

106. On 25 February 2011 Argall emailed NSC, stating that NSC had never been granted a fee waiver and that NSC would have to file an administrative appeal of FBI's denial.

107. On 5 October 2011 NSC appealed this determination to OIP (with permission to file a late appeal). OIP acknowledged this appeal on 9 December 2011 and assigned it Appeal No. AP-2012-00784.

108. On 23 May 2012 OIP affirmed FBI's denial of NSC's request for a public interest fee waiver.

109. NSC has a legal right under FOIA to receive a public interest fee waiver, and there is no legal basis for the denial by DOJ of said right.

TENTH CAUSE OF ACTION

**(NSC, STEIN, TRUTHOUT – FBI – EXCESSIVE FEES – 1148707-002, 1182251-000,
1173246-000, 1197184-000)**

110. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

Request No. 1148707-002

111. On 24 February 2011 FBI informed NSC that it had located approximately 2038 pages of material responsive to Request No. 1148707-002.² FBI informed NSC that it would only place approximately 500 pages on a single CD, requiring NSC to pay for five CDs. FBI stated, "The 500 page estimate is based on our business practice of processing medium and large track cases through interim releases that generally equal approximately 500 pages."

112. In response NSC informed FBI that it waived its right to interim responses and wanted all pages on a single CD.

113. On 5 October 2011 NSC appealed the FBI's practice of only placing approximately 500 pages on a CD to OIP as part of Appeal No. AP-2012-00784.

114. On 23 May 2012 OIP affirmed FBI's 500-page practice.

Request No. 1182251-000

115. On 10 November 2011 Stein submitted to FBI a FOIA request for all information pertaining to the searches conducted by FBI which was used, referenced, or relied upon in the Declarations of David Hardy to defend the adequacy of the FBI's searches in the case *Rosenfeld v. DOJ*. Stein did not request a public interest fee waiver.

116. This request stated:

Please provide any records produced in response to this request in electronic (soft-copy) form. Please provide soft-copy records by email or on a CD if email is not feasible. If a CD is necessary, Mr. Stein specifically absolves the FBI of its responsibility to make interim releases and directs the FBI to provide *all* responsive records on *one CD* at the end of its processing of this request unless all the records will not physically fit on one CD.

117. On 15 February 2012 FBI acknowledged receipt of this request and assigned it Request No. 1182251-000.

118. On 27 March 2012 FBI informed Stein that it had located approximately 694 pages of responsive material. FBI informed Stein that it would only place approximately 500 pages on a single CD, requiring Stein to pay for two CDs.

² Presumably the current edition of the MAOP is 2038 pages long.

119. On 2 April 2012 Stein appealed this determination to OIP. OIP acknowledged this appeal on 17 April 2012 and assigned it Appeal No. AP-2012-01926.

120. On 18 September 2012 OIP affirmed FBI's 500-page practice.

Request No. 1173246-000

121. On 13 September 2011 Stein submitted to FBI a FOIA request for all pages on the internal FBI Records Management Division ("RMD") website <http://rmd.fbinet.fbi>, as well as all documents, images, audio and video files, and any other files posted on the RMD website. Stein also requested a public interest fee waiver.

122. This request stated:

Please provide any records produced in response to this request in the *original* electronic (soft-copy) forms in which they are posted on the RMD website (e.g., word processing documents should remain word processing documents, spreadsheets should remain spreadsheets, image files should remain image files, etc.). The only exception to this rule is that actual webpages may be converted to Adobe Acrobat files. Please provide soft-copy records by email or on a CD if email is not feasible. If a CD is necessary, Mr. Stein specifically absolves the FBI of its responsibility to make interim releases and directs the FBI to provide *all* responsive records on *one CD* at the end of its processing of this request unless all the records will not physically fit on one CD.

123. On 15 September 2011 FBI acknowledged receipt of this request and assigned it Request No. 1173246-000.

124. On 27 September 2012 FBI released 567 pages of responsive material to Stein and withheld twelve pages. FBI informed Stein that it had identified approximately 21753 additional

pages and that it would only place approximately 500 pages on a single CD, requiring Stein to pay for forty-four CDs. FBI also denied Stein's request for a public interest fee waiver without giving any reasons.

125. Stein did not appeal this determination to OIP, since OIP had upheld FBI's 500-page practice multiple times before and had never to his knowledge reversed it.

Request No. 1197184-000

126. On 22 May 2012 Truthout submitted to FBI a FOIA request for records about the Campus Liaison Initiative. Truthout agreed to pay up to \$500 in processing fees.

127. On 17 August 2012 FBI acknowledged receipt of this request and assigned it Request No. 1197184-000. FBI informed Truthout that it had located approximately 26000 pages of responsive material. FBI informed Truthout that it would only place approximately 500 pages on a single CD, requiring Truthout to commit to pay \$765 for fifty-two CDs.

128. On 7 September 2012 Truthout appealed this determination to OIP, adding, "Truthout specifically absolves the FBI of its responsibility to make interim releases and directs the FBI to fill each CD to capacity and charge Truthout accordingly for the actual number of CDs used. This means that the FBI may *not* arbitrarily limit each CD to approximately 500 pages." OIP acknowledged this appeal on 26 September 2012 and assigned it Appeal No. AP-2012-03398.

129. Truthout also informed both FBI and OIP, "So that the FBI can continue to process this request while you consider this appeal, Truthout does commit to paying the \$765 duplication fee if you affirm the FBI's initial determination. However, Truthout reserves the right to seek judicial review of an unfavorable appeal decision on this matter, with the intent of reducing the fees to account for the proper number of CDs the FBI *should have* used."

130. As of this writing OIP has not issued a final determination on this appeal.

131. Unless the files are uncommonly large, a standard CD can hold thousands of pages of electronic records.

132. FBI's rationale for limiting the number of pages on a single CD is twofold. First, it will allegedly facilitate review of bulky documents by numerous analysts. Second, it will allegedly allow for rolling interim releases to be made.

133. The CDs used by FBI are non-rewritable media. Therefore, information can only be written to them once and cannot then be edited. This means that FBI analysts can only save information to CDs *after* they have finished processing it for release. Accordingly, the number of CDs created *after* analysts have completed processing the records bears no relation to the ability of the analysts to review and process the records.

134. NSC, Stein, and Truthout have all specifically requested that no interim releases be made. Accordingly, FBI has no reason to insist on multiple CDs for the purposes of making interim releases.

135. DOJ has admitted that this is an FBI policy. NSC has received multiple letters from FBI and OIP defending this policy.

136. A policy of artificially limiting the number of pages that can be stored on a CD, while charging requesters a "per CD" fee, is a violation of FOIA. Such a practice constitutes outrageous conduct for purposes of the broad equitable powers provided by FOIA to the Court. Such a policy is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

137. As frequent FOIA requesters to FBI for large volumes of electronic records who will continue making such requests, NSC, Stein, and Truthout stand to continue to be harmed by this ongoing practice in the future.

138. NSC, Stein, and Truthout are therefore entitled to relief in the form of a declaratory order that FBI is in violation of its statutory responsibilities under FOIA and an injunction compelling FBI pursuant to that statute to place as many pages as possible on a single CD if a requester gives informed consent waiving his right to interim releases.

139. Alternatively, NSC, Stein, and Truthout are entitled to relief in the form of an order enjoining FBI from charging requesters for multiple CDs if it elects to provide multiple CDs after receiving such informed consent.

140. NSC, Stein, and Truthout are also entitled to receive the records responsive to Request Nos. 1148707-002, 1182251-000, 1173246-000,³ and 1197184-000 on the smallest possible number of CDs.

ELEVENTH CAUSE OF ACTION

(NSC – CIVIL – FEE WAIVER DENIAL – 145-FOI-10718)

141. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

³ Stein concedes that his failure to file an administrative appeal regarding Request No. 1173246-000 would normally constitute a failure to exhaust administrative remedies for that request. Given that failure to exhaust administrative remedies is a jurisprudential rather than jurisdictional consideration in this Circuit, Stein respectfully suggests that judicial and agency resources would be conserved by considering Request No. 1173246-000 to be properly subject to this litigation, since the only question actually before the Court is the legitimacy of FBI's 500-page policy, and the only request-specific relief being sought is limited solely to, "If the Court holds that this practice violates FOIA, please apply that holding to this specific request." *See Jones v. BOP*, No. 03-1647, slip op. at 3 (D.D.C. May 18, 2004) (allowing plaintiff to maintain unexhausted claim that was "substantially similar" to exhausted claim, because reaching its merits would not undermine purposes of administrative review), *summary affirmance granted*, No. 04-5498 (D.C. Cir. Jan. 20, 2006). Given the multiple times that OIP has affirmed this practice on appeal, it is highly unlikely that an administrative appeal of its application to this specific request would result in a change of position.

142. On 19 September 2011 NSC submitted to Civil a FOIA request for a list of all FOIA cases handled by the Federal Programs Branch (“FPB”) between 2000 and the present. NSC also stipulated that should it be difficult to generate such a list, it would alternatively accept all Notices of Appearance filed by FPB attorneys in FOIA cases for the relevant time period. NSC requested a public interest fee waiver.

143. On 17 October 2011 Civil acknowledged receipt of this request and assigned it Request No. 145-FOI-10718. Civil denied NSC’s request for a public interest fee waiver.

144. On 2 December 2011 NSC appealed this determination to OIP. OIP acknowledged this appeal on 9 December 2011 and assigned it Appeal No. AP-2012-00782.

145. On 22 May 2012 OIP affirmed Civil’s denial of NSC’s request for a public interest fee waiver.

146. NSC has a legal right under FOIA to receive a public interest fee waiver, and there is no legal basis for the denial by DOJ of said right.

TWELFTH CAUSE OF ACTION

(NSC – CIVIL – FEE WAIVER DENIAL – 145-FOI-10719)

147. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

148. On 19 September 2011 NSC submitted to Civil a FOIA request for sworn declarations made by agency representatives as part of specified FOIA or Privacy Act cases. NSC requested a public interest fee waiver.

149. On 17 October 2011 Civil acknowledged receipt of this request and assigned it Request No. 145-FOI-10719. Civil denied NSC’s request for a public interest fee waiver.

150. On 2 December 2011 NSC appealed this determination to OIP. OIP acknowledged this appeal on 9 December 2011 and assigned it Appeal No. AP-2012-00783.

151. On 22 May 2012 OIP affirmed Civil's denial of NSC's request for a public interest fee waiver.

152. NSC has a legal right under FOIA to receive a public interest fee waiver, and there is no legal basis for the denial by DOJ of said right.

PART III: REFERENCE MATERIALS

THIRTEENTH CAUSE OF ACTION

(STEIN – EOUSA – RECORDS DENIAL – 11-4569)

153. Plaintiffs repeat and reallege the allegations contained in all paragraphs set forth above.

154. On 13 September 2011 Stein submitted to JMD a FOIA request for all records in the Freedom of Information and Privacy Brief Bank, which is listed on the DOJ intranet website maintained by JMD.

155. On 17 October 2011 JMD acknowledged receipt of this request and informed Stein that it was referring the request to EOUSA.

156. On 30 November 2011 EOUSA acknowledged receipt of this referred request. Between 30 November 2011 and 2 February 2012 EOUSA assigned multiple request numbers to this request. On 2 February 2012 EOUSA informed Stein that it had consolidated the various files into Request No. 11-4569.

157. On 8 March 2012 EOUSA withheld all responsive documents.

158. On 12 March 2012 Stein appealed all withholdings to OIP. OIP acknowledged this appeal on 19 April 2012 and assigned it Appeal No. AP-2012-01654.

159. On 23 August 2012 OIP remanded this request to EOUSA for further processing.

160. As of this writing EOUSA has not issued a final determination on this request.

161. As twenty working days have elapsed without a substantive determination by EOUSA, Stein has exhausted all required administrative remedies.

162. Stein has a legal right under FOIA to obtain the information he seeks, and there is no legal basis for the denial by DOJ of said right.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Ryan Shapiro, Jeffrey Stein, National Security Counselors, and Truthout pray that this Court:

(1) Declare and find that the Department of Justice violated FOIA by declaring information about Federal Bureau of Investigation FOIA searches conducted within the last twenty-five years blanketly exempt under Exemption (b)(7)(E);

(2) Declare and find that any DOJ regulations, guidelines, or policy statements that authorize the blanket invocation of Exemption (b)(7)(E) to withhold information about FBI FOIA searches constitute an unreasonable interpretation of the statutory obligations imposed by FOIA;

(3) Enjoin DOJ from invoking Exemption (b)(7)(E) to withhold information about FOIA searches and to amend its regulations, guidelines, and policy statements accordingly;

(4) Declare and find that FBI violated FOIA by refusing to search for records about previous FOIA requests without privacy waivers, and that this violation was intentional and/or willful;

(5) Declare and find that any DOJ regulations, guidelines, or policy statements that authorize refusing to search for records about previous FOIA requests without privacy waivers constitute an unreasonable interpretation of the statutory obligations imposed by FOIA;

(6) Order DOJ, in the form of injunctive relief, to conduct searches for records about previous FOIA requests without requiring privacy waivers and to amend its regulations, guidelines, and policy statements accordingly;

(7) Declare and find that FBI violated FOIA by refusing to store more than approximately 500 pages on a single CD and that DOJ violated FOIA by endorsing this practice, and that this violation was intentional and/or willful;

(8) Declare and find that any DOJ regulations, guidelines, or policy statements that authorize arbitrarily restricting the number of pages of electronic records stored on a CD constitute an unreasonable interpretation of the statutory obligations imposed by FOIA;

(9) Order FBI, in the form of injunctive relief, to place as many pages as possible on a single CD if a requester gives informed consent waiving his right to interim releases and to amend its regulations, guidelines, and policy statements accordingly;

(10) Order DOJ to disclose the requested records in their entirety and make copies promptly available to Plaintiffs in electronic format when so requested;

(11) Order DOJ to grant NSC's requests for public interest fee waivers;

(12) Order preliminary and permanent injunctive and/or declaratory relief as may be appropriate;

(13) Award reasonable costs and attorneys' fees as provided in 5 U.S.C. § 552(a)(4)(E), 28 U.S.C. § 2412(d), or any other applicable law;

(14) Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and

(15) Grant such other relief as the Court may deem just and proper.

Date: November 20, 2012

Respectfully submitted,

/s/ Kelly B. McClanahan
Kelly B. McClanahan, Esq.
D.C. Bar #984704
National Security Counselors
1200 South Courthouse Road
Suite 124
Arlington, VA 22204
301-728-5908
240-681-2189 fax
Kel@NationalSecurityLaw.org

/s/ Jeffrey L. Light
Jeffrey L. Light, Esq.
D.C. Bar #485360
1712 Eye Street, NW
Suite 915
Washington, DC 20006
202-277-6213
Jeffrey.Light@yahoo.com

Counsel for Plaintiffs